

No. 15029

In the

United States Court of Appeals

For the Ninth Circuit

ALLEEN S. MILDREN and
DONALD LEE MILDREN,

Appellants,

vs.

JESSIE MILDREN,

Appellee.

Appellants' Opening Brief

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STATEMENT OF PLEADINGS AND FACTS AS TO JURISDICTION:

This action was filed in the United States District Court for the Southern District of California, Central Division, and was numbered therein Civil Action No. 17253-WB. The action was brought by Mutual Life Insurance Company of New York, a corporation, plaintiff vs. Alleen S. Mildren, Donald L. Mildren, Paul Mildren, Jr., Jessie Mildren and fictitious named defendants. None of the fictitious named defendants were served with summons, and accordingly the action proceeded as will hereinafter be stated between the named defendants.

Jurisdiction of the District Court of Appeal existed under the provisions of Title 28 United States Code, Section 1332 upon the ground that the plaintiff, Mutual Life Insurance Company of New York is a citizen and resident of the State of New York and that each of the defendants is a citizen of one of the states of the United States other than the State of New York, and that the amount in controversy exclusive of interest and costs exceeds the sum of \$3,000.00. (Transcript of Record, page 3).

The complaint for declaratory relief and interpleader set forth the facts as follows: That defendant, Alleen S. Mildren, was formerly the wife of Paul Mildren, the insured, named in the five policies of Life Insurance designated in paragraph IV of the Complaint (Transcript of Record, page 5). The defendants, Donald L. Mildren and Paul Mildren, Jr., are the sons of the insured, Paul Mildren; and that the defendant, Jessie Mildren, is the mother of the insured, Paul Mildren, and was originally designated in one policy of insurance as Jessie Wood.

The amount in controversy was \$13,634.74 which was paid into the registry of the Court by the plaintiff (Transcript of Record, page 88). Judgment was entered November 30, 1955, and notice of appeal was filed on December 27, 1955, (Transcript of Record, pages 108 to 112 inclusive).

Jurisdiction of the Court of Appeals exists under the provisions of the Judicial Code, Section 128, 28 U.S.C.A. Section 1291, this being an appeal from a

final judgment of the United States District Court. Rules of Civil Procedure, Section 73A.

STATEMENT OF THE CASE

This action was as hereinabove noted commenced by the filing of an action in interpleader and for declaratory relief by the plaintiff, Insurance Company, against the defendants, Alleen S. Mildren, Donald Mildren, Paul Mildren, Jr., and Jessie Mildren, setting forth that the plaintiff, Insurance Company, issued some five policies of life insurance to Paul Mildren, the insured, (Transcript of Record, page 5) as to policy No. 3373875, the beneficiary originally named was William Mildren, father of the insured; that about January 10, 1935, the defendant, Donald L. Mildren, became the beneficiary under certain circumstances; as to policy No. 3377665 the original beneficiary was Jessie Wood, mother of the insured, and now Jessie Mildren, and that about October 16, 1949, the designation of beneficiary was cancelled and the defendant, Paul Mildren, Jr., was named beneficiary under certain circumstances; as to the other three policies, defendant Alleen S. Mildren, was designated as beneficiary with the two children, Donald L. Mildren and Paul Mildren, Jr., named as alternate beneficiaries. (Transcript of Record, pages 5 to 9 inclusive).

The complaint goes on to state that about April 8, 1953, an interlocutory judgment of divorce was entered in an action in the Superior Court of the State of California, in and for the County of San Bernardino,

awarding the plaintiff, Alleen S. Mildren, a decree of divorce from the insured, Paul Mildren, and that the provisions of said decree read in part as follows: "4. That the defendant and cross-complainant (Paul Mildren) be and he is hereby awarded as his sole and separate property the following: ' B. Life Insurance Policies.' 5. That each of the parties be and they are hereby ordered to deliver to the other any of the real or personal property in the possession of the person or party other than the one to whom the same is herein awarded." The final decree of divorce in said action was filed on or about April 12, 1954; that said final decree continued in effect the provisions of said interlocutory decree with respect to the division of property between the parties to said divorce action, to wit, the defendant, Alleen S. Mildren and said insured, and specifically the portions of the interlocutory decree quoted hereinabove in this paragraph. (Transcript of Record, pages 9 and 10).

The complaint proceeds to allege that on or about June 17, 1953, the insured, Paul Mildren, executed and there was thereafter furnished to the plaintiff a further and additional request for change of beneficiary under the said five policies of insurance and each of them; and that said insured designated as his intended beneficiary under each of said policies of insurance defendant, Jessie Mildren, described in the request of beneficiary as the mother of the insured; that each of the policies of insurance contained a provision to the effect that the right to a change of the beneficiary

was reserved solely to the insured with the exclusion of the beneficiary, and that any change of beneficiary thereunder should be effective only upon endorsement of the same on such policy of insurance by the plaintiff; that with respect to any changes of beneficiary to the defendant, Jessie Mildren, none of the policies of insurance was submitted to the plaintiff for endorsement and alleges upon information and belief that the reason the insured did not deliver the policies to the plaintiff was because the same were in the possession of the defendant, Alleen S. Mildren. (Transcript of Record, pages 10 to 12 inclusive).

The complaint proceeds to aver that the plaintiff did not know whether the interlocutory and final decrees of divorce were valid and effective to constitute the insured the sole owner of the policies as his sole and separate property, whether the attempted or purported change of beneficiary hereinabove referred to was valid and effective to change the beneficiary in the absence of endorsement of such change by the plaintiff on each of said policies of insurance; that Jessie Mildren claims that the interlocutory and final decrees of divorce were valid and effective and that Jessie Mildren is the sole beneficiary under the policies of insurance and entitled to the receipt of payment of the entire proceeds; that defendant, Jessie Mildren, has demanded payment by the plaintiff of the entire proceeds under each of the policies of insurance; that defendant, Alleen S. Mildren, claims that the aforesaid attempted or purported change of beneficiary referred to in paragraph XI of plaintiff's complaint was

invalid and ineffective by reason of the incompetence of the insured at the time of the execution of purported or attempted change of beneficiary, and by reason of the fact the change was never endorsed on any of the said policies of insurance; that defendant, Alleen S. Mildren, claims that she now is and remains the primary beneficiary under three of said policies of insurance; and that the defendants, Donald L. Mildren, and Paul Mildren, Jr., claim or may claim as contingent beneficiaries under two policies of insurance; that certain additional claims were made by the defendants, Donald L. Mildren and Paul Mildren, Jr.; that an actual controversy consists between plaintiff and defendant by reason of the provisions of the policies of insurance as to who is entitled to receive payment of all or a portion of the proceeds of the insurance policies, and that the claims, contentions and interests of each and all of defendants are conflicting that plaintiff does not know and cannot safely determine for itself whether one or more of the respective claims, contentions and interests are valid, and cannot safely make payment to any one or more of the defendants of the whole or any part of the insurance proceeds; that accordingly the plaintiff, insurance company, deposited with the registry of the Court the entire proceeds of the policies of insurance. The prayer followed that the defendants be ordered to deliver up the policies of insurance to the Court; that it be determined which if any of the parties might be entitled to receive the proceeds of the same; and that the plaintiff be discharged from liability. (Transcript of Record, pages 11 to 21 inclusive).

Jessie Mildren filed a cross-complaint in which she averred the issuance of the policies upon various dates from October 22, 1924, to and including February 19, 1940; averring that changes of beneficiary had occurred as hereinabove stated; averring the existence and nature of the interlocutory decree of divorce referred to above; that the insured, Paul Mildren, demanded delivery of the policies of insurance to him, but that delivery had been refused; she averred the making of an order to show cause in the Superior Court of the State of California, in and for the County of San Bernardino, on or about January 13, 1954, seeking to punish the defendant, Alleen S. Mildren, for failing to deliver the policies, and averring that the Superior Court had made an order determining that Alleen S. Mildren had in her possession certain life insurance policies which are the same as those designated above; and that Alleen S. Mildren was adjudged guilty of contempt for failure to deliver the policies; that no service of order adjudging Alleen S. Mildren to be in contempt was ever served upon her. The cross-complaint further averred that on or about June 17, 1953, the insured, Paul Mildren, executed and delivered to the plaintiff a further and additional request to change the beneficiary under the five policies of insurance herein involved, and in which he designated the said Jessie Mildren as his beneficiary. (Transcript of Record, pages 22 to 32 inclusive.)

The cross-complaint proceeds to aver that the interlocutory and final decrees of divorce and the order

adjudging Alleen S. Mildren to be in contempt were valid and effective to constitute the insured sole owner of the policies of insurance, with the change of beneficiary referred to as valid and effective to change the beneficiary to Jessie Mildren. (Transcript of Record, pages 32 to 34 inclusive).

The answer to the complaint filed by Jessie Mildren was to the same effect. (Transcript of Record, pages 36 to 38 inclusive).

Alleen S. Mildren, one of the appellants herein, filed a cross-complaint averring that the plaintiff had paid the moneys into court with the intent that the parties be decreed to litigate between themselves their rights as to the policies. It averred the commencement of the divorce action hereinabove referred to, and contains this specific averment, paragraph VI (Transcript of Record, page 40). "That the divorce action was prosecuted to final judgment in the above-entitled Superior Court; that under and by virtue of the terms of the judgment entered therein there was awarded to the said Paul Mildren "life insurance policies"; that no other or further designation in said interlocutory judgment of divorce as to life insurance policies was contained in said decree.

That in the cross-complaint of Paul Mildren filed in the divorce action, it was alleged under oath by Paul Mildren, now deceased, that the parties in said action owned and possessed as community property the following: "C—Life Insurance Policies"; that said life insurance policies were not in said cross-complaint

designated with any greater particularity than as hereinabove set forth; and that the cross-complaint and interlocutory judgment of divorce were and each of them was so vague and indefinite as to be void for uncertainty and totally unenforceable so far as the possession and ownership of the life insurance policies were concerned; that the interlocutory judgment of divorce has become final, and that the judgment of divorce did not by or in any of its terms change, alter or modify any of the terms of the interlocutory judgment of divorce. The cross-complaint alleges the invalidity of the change of beneficiary, and as a second and distinct cause of action it averred that at the time and place, when and where the deceased, Paul Mildren, made or attempted to make a change of beneficiary he was not then and there of sound mind, but was incompetent by reason of mental and bodily infirmities. (Transcript of Record, pages 39 to 43 inclusive.)

Donald L. Mildren filed a cross-complaint only as to policy No. 3373875 to the effect that he was entitled to receive the proceeds of the same, and also that he was the contingent beneficiary named in the other policies of insurance described in plaintiff's complaint, and that Jessie Mildren was entitled to no interest of, in and to the policies or the proceeds or avails thereof. The answers of Alleen S. Mildren and Donald L. Mildren to plaintiff's complaint were in general accord with the allegations set forth in their cross-complaint. (Transcript of Record, pages 44 to 56 inclusive).

Alleen S. Mildren and Donald L. Mildren, jointly filed an answer to the cross-complaint of Jessie Mildren and averred, admitted and denied as follows:

Admitted that defendant and cross-defendant, Alleen S. Mildren had in her possession the policies of life insurance described in plaintiff's complaint, and in other pleadings; denied that her holding of the same was in violation of or contrary to the terms of the interlocutory decree of divorce; admitted the issuance of the order to show cause; admitted the making of the contempt order hereinabove referred to; averred that the order so made was beyond the jurisdiction of the Superior Court; and denies that Alleen S. Mildren held the policies in violation of any valid order. (Transcript of Record, pages 56 to 59 inclusive). The answer to the cross-complaints of Alleen S. Mildren and Donald L. Mildren was in substantial accordance with the cross-complaint of Jessie Mildren. (Transcript of Record, pages 60 to 67 inclusive).

An Order was made on January 7, 1955, discharging the plaintiff from liability, awarding attorneys fees to plaintiff's attorneys, and requiring the parties to litigate between themselves. (Transcript of Record, pages 67 to 72 inclusive).

It was averred by all parties and not disputed that Paul Mildren, the insured, died on or about July 21, 1954, in Los Angeles, California.

A Pre-Trial Order was made stipulating to the following facts:

(1) The insured, Paul Mildren, is the son of Jessie Mildren; the father of Donald L. Mildren and Paul Mildren, Jr.; and was the husband of Alleen S. Mildren until the marriage was dissolved by divorce.

(2) A divorce action was filed by Alleen S. Mildren, as plaintiff, against the said Paul Mildren, in the Superior Court of the State of California, in and for the County of San Bernardino, Action No. 68261, on September 20, 1950; an interlocutory decree of (116) Divorce was made and entered in said action on April 8, 1953, in Judgment Book 121, page 75, and which contained in part the following language:

There is hereby set aside and awarded to the defendant and cross-complainant as his sole and separate property:

- (a) The trailer.
- (b) Life insurance policies.
- (c) Cash in the sum of \$7800.00.

“5. That each of the parties be and they are hereby ordered to deliver to the other any of the real or personal property in the possession of the person or party other than the one to whom the same is herein awarded.”

(3) A final decree of divorce was made and entered in said divorce action on April 12, 1954, in Book 125, Page 28 of Judgments.

(4) On December 2, 1953, in said divorce action at the request of Paul Mildren, an order to show cause why Alleen S. Mildren, should not be punished for

contempt for her failure, among other things, to turn over to Paul Mildren the following described insurance policies was issued by the Superior Court of San Bernardino County:

#397674A1, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Donald Lee Mildren.

399418, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Paul Mildren, Jr.

Five policies, #3373,875 - 3377,665 - 3707,187 - 5448,542 - 5586,988, in the Mutual Life Insurance Company of New York, on life of Paul Mildren, Sr.

Said order to show cause was served on Alleen S. Mildren on December 4, 1953, by a deputy of the Sheriff of the County of San Bernardino.

(5) A certified copy of the said interlocutory decree in said divorce action was served on Alleen S. Mildren by the Sheriff's (117) office of San Bernardino County on December 23, 1953.

(6) On January 13, 1954, in said divorce action at the request of Paul Mildren, the Court issued an order to show cause why Alleen S. Mildren should not be punished for contempt for her failure to turn over to Paul Mildren the following described life insurance policies:

#397674A1, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Donald Lee Mildren.

#399418, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Paul Mildren, Jr.

Five policies, #3373,875 - 3377,665 - 3708,187 - 5488,542 - 5586,988 in the Mutual Life Insurance Company of New York on life of Paul Mildren, Sr.

(7) Said order to show cause issued on January 13, 1954, was served by the Sheriff's Office of San Bernardino County on Alleen S. Mildren on January 14, 1954.

(8) A trial was held before said Superior Court on January 25 and 26, 1954, at which time some four separate matters were heard by the Court. These included:

1. An action brought in claim and delivery by Alleen S. Mildren against Paul Mildren and Jessie Mildren to recover certain personal property, said to have been converted by Paul Mildren and Jessie Mildren to their own use, which resulted in a judgment in favor of the defendants.

2. An action for forcible detainer for waste and for value of use and occupation of premises brought by Alleen S. Mildren against Paul Mildren and Jessie Mildren, which resulted in a judgment in favor of the defendants.

3. An action to enjoin and restrain the Sheriff of San Bernardino County from proceeding to sell certain property of the plaintiff Alleen S. Mildren, which had been levied upon by the Sheriff in an attempt to enforce the provisions of the (118) judgment referred to

herein above, wherein and whereby the defendant Paul Mildren was awarded cash in the sum of \$7800.00. A judgment in favor of the defendant in that action followed.

4. A proceeding in contempt based on the order to show cause hereinabove set forth and which resulted in the issuance of an order in action No. 68261 as follows:

“Plaintiff is guilty of contempt because of her failure to deliver possession of the following described insurance policies to defendant and plaintiff is hereby ordered to deliver the following described policies to defendant as his sole and separate property or in the alternative to deliver them to the Clerk of the above entitled Court to be held until this order becomes final either by lapse of time or on decision on appeal:

“#397674A1, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Donald Lee Mildren,

“#399418, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Paul Mildren, Jr.,

“Five policies, #3373,875, 3377,665, 3708,187, 5448,542, 5586,988 in the Mutual Life Insurance Company of New York on life of Paul Mildren, Sr.

“Upon the delivery of said policies to defendant, plaintiff will be purged of her contempt.”

(9) No service of said order was ever made upon the said Alleen S. Mildren.

(10) There was executed by the said Paul Mildren and introduced in evidence in said action No. 68261, a deed and property settlement agreement wherein said Paul Mildren transferred to the said Alleen S. Mildren all property contained in the home property which was then located at 346 North Mango Street, Fontana, California, and which has now been re-numbered 8208 Mango Street, Fontana, California.

(11) The Findings of Fact signed and filed in connection (119) with the trial of said order to show cause on May 7, 1954, by the Superior Court of the State of California, in and for the County of San Bernardino, in the said divorce action found among other things:

“Plaintiff (Alleen S. Mildren) has in her possession the following described life insurance policies which were awarded to defendant (Paul Mildren) in the interlocutory judgment of divorce rendered herein and which now belong solely and exclusively to the defendant (Paul Mildren) and to which he is entitled to possession:

“#397674A1, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Donald Lee Mildren.

“#399418, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Paul Mildren, Jr.,

“Five policies, #3373,875, 3377,665, 3708,187, 5448,542, 5586,988 in the Mutual Life Insurance Company of New York on life of Paul Mildren, Sr.”

(12) All of the judgments, decrees and orders referred to in said divorce action have become final and none of them have ever been appealed, vacated or modified in any way.

(13) On or about April 12, 1954, Robert McWilliams as attorney for the said Paul Mildren, wrote and delivered through the United States mail to Attorney Taylor F. Peterson a letter in the following words:

“Dear Mr. Peterson:

As I understand your last letter, the only part of the decision made by Judge Curtis which you are contesting is the one with reference to the unlawful detainer action.

I assume, therefore, that you will be willing to turn over the life insurance policies to me for Dr. Mildren. (120)

If I am correct, please let me know how you want to handle this, if you want to mail them to me or just how you want them delivered.

Very truly yours,”

(14) The said Attorney Taylor F. Peterson on or about April 19, 1954, wrote and delivered through the mail to said Robert McWilliams a letter as follows:

“Dear Mr. McWilliams:

This will acknowledge receipt of your letter dated April 12, 1954.

I do not have the life insurance policies in my possession. Mrs. Mildren has, and she has not as yet given me instructions as to what she wished me to do. After judgment has been entered and

Notice of Entry of Judgment is sent me, it will probably be necessary for me to consult with her again to see whether she desires to file Notice of Intention to move for a new trial, or to appeal or whether she intends to comply with the order.

With regard to the matter of the personal property, I instructed Mrs. Mildren to have it delivered to the Fontana Van & Storage Company, trailer included, and for Fontana Van & Storage Company, in turn, to notify you or Dr. Mildren when the property had been received by them. This will, I think, take care of this situation.

Thank you for your courtesy in this matter, I am,

Very truly yours,"

(15) On or about June 17, 1953, the said Paul Mildren executed and delivered to The Mutual Life Insurance Company of New York written requests for change of beneficiaries, requesting that the beneficiaries on all policies involved in this suit be changed to Jessie Mildren as the mother of the insured. (121)

The issues of law to be determined by the Court were set forth at length in the Pre-Trial order which appears on pages 82 and 83 of the Transcript of Record and which read as follows:

(1) Were the insurance policies, which are the subject of the present action, delivered and transferred by Paul Mildren, deceased, to Alleen S. Mildren so that title to said policies passed to her on or about January 28, 1948?

(2) Did the interlocutory and final decrees and

the Order made on trial of the orders to show cause in action No. 68261 in the Superior Court of the State of California in and for the County of San Bernardino operate to transfer title to the policies of insurance which are the basis of the present action to the said Paul Mildren?

(3) In the event that the decree did not transfer title to any policies to the defendant Paul Mildren, were the policies community property? Were they paid for from earnings of the parties namely Alleen S. Mildren and Paul Mildren, and as to the cross-defendant, Donald L. Mildren, did the policy in his favor pass to him upon the death of his father?

(4) In the event the Court finds that the decree of divorce did not transfer title to the policies to Paul Mildren, did Paul Mildren make a valid gift of his one-half interest in the policies of his mother Jessie Mildren? (123)

(5) Is Alleen S. Mildren entitled to all the proceeds of the policies because of the fact that no change of beneficiaries was ever effected?

(6) Was the attempted change of beneficiary on all of said policies invalid because of the failure to endorse on the policy contract such changes?

(7) Did the Mutual Life Insurance Company of New York, plaintiff herein, waive the requirement that a change of beneficiary should be attached to and endorsed upon the policies by filing this interpleader suit?

(8) Was the requirement of attaching the request for change of beneficiary to the insurance policies excused because the policies were not available and could not be obtained by the insured Paul Mildren?

THE ORAL PROCEEDINGS

At the trial defendant and cross-defendant, Alleen S. Mildren, testified that she and Paul Mildren, Sr., were married July 23, 1926, and the two children were born the issue of said marriage named Paul Anthony Mildren born September 21, 1928, and Donald Lee Mildren, born October 31, 1932, and that the insurance policies which are involved in this action were obtained during the period of their marriage. (Transcript of Record, pages 115 and 116). That during the month of January, 1948, Alleen S. Mildren and Paul Mildren, now deceased, executed a document relating to their property rights. This document was marked cross-defendants Exhibit A and received into evidence. (Transcript of Record, pages 117 and 118, and page 120). This document appears as defendant's exhibit A in the documents certified to by the Clerk. (See pages 181 to 183 of the Transcript of Record). The witness testified that at the time the documents were executed Paul Mildren's mother had them and deceased agreed to bring them to Alleen S. Mildren as soon as he came out again. It was testified to that approximately a year or two previous to January 28, 1948, decedent had been living with his mother in Los Angeles and came to the home of the parties at 346 North Mango Street, Fontana, only on weekends. (Transcript of Record, page 126); that following the execution of the agreement (Alleen Mildren's Exhibit A) he brought the life insurance policies involved in this action to the witness at her home in Fontana, contained in a big, heavy shopping bag; that the policies remained in the living

room of the Fontana home until the following Monday at which time deceased and witness took the policies to a neighbor, Mrs. Maycock, for safe keeping while witness was to go to San Francisco and visit, but upon her return she obtained the policies from Mrs. Maycock and put them in the vault. (Transcript of Record, pages 127 to 128 inclusive); that at the time of delivering the policies deceased said "this is your Social Security"; that the source of the funds to pay the premiums on the policies were monies earned jointly by witness and deceased. Deceased was an osteopathic physician and surgeon. (Transcript of Record, page 128) and that the policies had always been in the possession of Alleen S. Mildren. On behalf of Alleen S. Mildren the following documents were offered and received in evidence as a single exhibit and appear in the certificate of the clerk with the Transcript of Record. Complaint for divorce in the Superior Court action San Bernardino County filed September 29, 1950, answer filed September 28, 1950, Cross-Complaint filed September 28, 1950, answer to Cross-Complaint filed November 2, 1950, Findings of Fact and Conclusions of Law filed April 8, 1953; all these documents were annexed together as cross-defendant's Exhibit C and were received in evidence. (Transcript of Record, page 170).

Donald Lee Mildren testified he knew when the document (Alleen S. Mildren's Exhibit A) was executed the latter part of January, 1948; that some time in February his father, the deceased, Paul Mildren, Sr., brought the policies to the Mango Street home in a

shopping bag on Friday or Friday evening, and that he knew his mother and father took the policies to the home of Mrs. Maycock. (Transcript of Record, pages 140 and 141).

That the witness, Mrs. Edith V. Maycock, testified that the policies were brought to her home by deceased and Alleen S. Mildren in the early part of February, 1948, and that they were in her possession for a few days. (Transcript of Record, pages 142 to 145 inclusive).

STATEMENTS OF POINTS RELIED UPON BY APPELLANTS

1. That the trial court erred in determining as is set forth in paragraph 19 of the Findings of Fact and Conclusions of Law (page 13 thereof), that the interlocutory and final decrees of divorce in the action of Alleen S. Mildren, Plaintiff, vs. Paul Mildren, Defendant, in the Superior Court of the State of California, in and for the County of San Bernardino, were valid and effective to constitute the insured (Paul Mildren) the sole owner of five policies of insurance which are the subject of the above-entitled action.

2. That the trial court erred in determining in paragraph 19 of the Findings of Fact and Conclusions of Law; that a purported change of beneficiary as to said policies by the insured, Paul Mildren, was valid and effective to change the beneficiary under each of said policies of insurance, and that the defendant, Jessie Mildren, (Appellee herein) is the sole beneficiary under said five policies of insurance and each of

them, and is entitled to receive payment of the entire proceeds thereof.

3. That the trial court erred in determining that the interlocutory and final decrees of divorce in the divorce action hereinabove mentioned were sufficient in law to transfer any title to the insurance policies hereinabove designated for the reason that in said interlocutory and final decrees of divorce, only "Life Insurance Policies" were assigned to the deceased, Paul Mildren, and that such designation was totally ineffective under the terms of the pleadings, findings of fact and conclusions of law and interlocutory and final decrees of divorce therein, to convey, transfer or assign title to any specific life insurance policies.

4. That the trial court erred in determining that the agreement of the parties dated January 28, 1948, did not transfer title to the insurance policies hereinabove mentioned from the said Paul Mildren, now deceased, to the appellant, Alleen S. Mildren.

5. That the trial court erred in determining that notwithstanding the community character of the life insurance policies hereinabove mentioned that the deceased, Paul Mildren, could lawfully transfer more than one-half of the proceeds of said policies.

6. That the trial court erred in failing to find specifically upon the issue as to whether or not the deceased, Paul Mildren, had lawful authority to transfer more than one-half of the proceeds of such policies.

THE FINDINGS AND JUDGMENT

The trial court made Findings of Fact in favor of cross-complainant, Jessie Mildren, to the effect that Jessie Mildren was entitled to the proceeds of the policies of insurance by reason of the fact that the interlocutory and final decrees of divorce and the Court Order referred to in paragraphs 10 through 15 inclusive of the Findings (Transcript of Record, pages 95 to 100 inclusive), to change the beneficiary under the policies of insurance were valid and effective, and that Jessie Mildren is the sole beneficiary under each of said policies of insurance and each of them is entitled to receive payment of the entire proceeds thereof. (Transcript of Record, pages 103 and 104). Judgment followed that the Clerk be ordered to pay to Jessie Mildren the balance of the money which was paid to the registry of the Court by the plaintiff in the net amount of \$12,865.24 after payment of attorneys' fees and costs to plaintiff, and that the insurance policies be cancelled and declared to be of no further force and effect, and that all parties be perpetually enjoined and restrained from instituting or prosecuting a suit or proceeding in respect to said insurance policies. (Transcript of Record, pages 108 to 111 inclusive).

ARGUMENT

The following matters appear to counsel to be uncontrovertible upon the basis of the record as the same has heretofore been outlined:

1. That the insurance policies were the community property of Paul Mildren, deceased, and Alleen Sara Mildren, Defendant, cross-complainant and cross-defendant herein.

2. That in the divorce action in the Superior Court San Bernardino County, the only allegation made in the pleadings and the only language appearing in the Findings of Fact and Conclusions of Law and interlocutory judgment of divorce was that "Life Insurance Policies" were transferred to Paul Mildren, now deceased.

3. That under the terms and conditions of the agreement Alleen S. Mildren's Exhibit A, the real property consisting of the home in Fontana and all personal property then in the home was transferred to Alleen S. Mildren.

4. That the insurance policies were then within the contemplation of the parties as being included in the transfer of property which was then contained in the house.

5. That the insurance policies were at all times after February, 1948, in the possession of Alleen S. Mildren, and that no effort was made between the date of the interlocutory judgment of divorce which was April 8, 1953, until January 13, 1954, at which time the

deceased, Paul Mildren, having changed attorneys as appears on the documents on file herein, did obtain the issuance of an order to show cause.

6. That no motion or other proceedings were had in the Superior Court having for its purpose the amending or correcting of the interlocutory decree of divorce so as to specify the policies with particularity.

I.

It is, of course, the general rule that judgments are to be enforced, and that all reasonable inferences which may be drawn from the language of the judgment are to be taken into account in determining what the judgment actually provided.

City of Winter Haven vs. A. M. Klemm & Son,
132 Florida 334, 181 So. 153.

On the other hand the Court may not by construction add new provisions to a judgment which were omitted or withheld in the first instance. *Butler vs. Denton*, 150 Fed. 2nd 687. Under California law which, of course, must be considered by the Federal Courts in construing property rights between residents of the same state, it has been held that judgments as to property are fatally defective where they fail to describe with certainty the lands or properties affected. *People vs. Rio Nido Company, Inc.*, 29 Cal. App. 2nd 486; 85 Pac. 2nd 461.

The validity of a judgment is to be determined as of the date of its rendition, and it is not validated and made operative by subsequent proceedings based on the

judgment. *Langston vs. Nash*, 192 Georgia 427, 15 So. Eastern 2nd 481; *Winn vs. Armour & Co.*, 184 Georgia 769; 193 S. E. 447. Accordingly such recitals in the Findings of Fact and Conclusions of Law and Judgment in the instant case with regard to the effect of the Contempt proceedings cannot be held to breathe life into a dead or void provision of the judgment. It has been held that a description such as the one herein involved "Life Insurance Policies" is too indefinite to give the Court any power to enforce the judgment. *Walsh vs. Smith*, 45 Cal. 230; *Kelley vs. McKibben*, 53 Cal. 13; *Cooke vs. Aguirre*, 86 Cal. 479; *Stevens vs. Superior Court*, 7 Cal. 2nd 110 at 112; 59 Pac. 2nd 988. (No Pacific Reporter Citations on the first three cases).

We have here a situation where a deceased who was represented by counsel in the divorce action chose to rely upon the language in his answer and cross-complaint (Alleen S. Mildren's Exhibit C) that what he sought to recover were life insurance policies without any more specific allegation. There was undoubtedly some duty upon him to supply this specific information to the Court if his counsel deem the findings as proposed to be defective. Decedent had at that time the right, privilege, and duty to object to the findings; if his objections were not sustained to move for a new trial; and to appeal if his motion for a new trial were denied. *Hathaway vs. Ryan*, 35 Cal. 187; (No Pacific Reporter Citation) *Estate of Perry*, 64 Cal. App. 21, 220 Pac. 321; *Sweet vs. Hamilothoris*, 84 Cal. App.

775, 258 Pac. 652; *Combs vs. Eberhardt*, 120 Cal. App. 25, 7 Pac. 2nd 338; *Moore vs. Craig*, 5 Cal. App. 2nd 283, 42 Pac. 2nd 647. It was held in the latter two cases that when no objection to the findings was made when the findings were served on the losing party such party has waived his right to object to their uncertainty.

It may be further claimed that the opinion of the trial court which is contained in Jessie Mildren's Exhibit 2 may be used to supply some deficiency. The decisions of the Courts of California are to the contrary. *Boas vs. Bank of America*, 51 Cal. App. 2nd 592, 125 Pac. 2nd 620; *Lord vs. Katz*, 54 Cal. App. 2nd 363, 128 Pac. 2nd 907; *Berger vs. Stiner*, 72 Cal. App. 2nd 208, 164 Pac. 2nd 559; *Wuest vs. Wuest*, 72 Cal. App. 2nd 101, 164 Pac. 2nd 32; *Williams vs. Kinsey*, 74 Cal. App. 2nd 583, 169 Pac. 2nd 487; *Offer vs. McMillan*, 101 Cal. App. 2nd 840, 226 Pac. 2nd 380; *Gantner vs. Gantner*, 39 Cal. 2nd 272, 246 Pac. 2nd 923; *Larson vs. Thoreson*, 116 Cal. App. 2nd 790, 254 Pac. 2nd 656.

CONCLUSION UPON THIS SUBJECT

It is accordingly submitted that the findings and interlocutory judgment of divorce in the divorce action were insufficient to transfer title to any policies whatever since the description contained in the findings and interlocutory decree failed to describe any ascertainable property and that accordingly the judgment must be construed as leaving unascertained and undistributed community property which was not disposed of in the divorce action.

II.

The trial court erred in determining in paragraph 19 of the findings of fact and conclusions of law (Transcript of Record, pages 103 and 104) that the purported change of beneficiary as to the policies by the insured Paul Mildren was valid and effective to change the beneficiaries under each of said policies of insurance and that the defendant Jessie Mildren, Appellee herein, is the sole beneficiary under said five policies of insurance and each of them and entitled to receive the entire proceeds thereof.

Under California Law although the husband has management and control of the community personal property (Civil Code Section 172) he may not make a valid gift of the proceeds of life insurance policies purchased with community funds in excess of fifty per cent. *Martinez vs. Hudson*, 14 Cal. App. 2nd 42, 57 Pac. 2nd 970; *Mazman vs. Brown*, 12 Cal. App. 2nd 272, 55 Pac. 2nd 539; *Estate of McNutt*, 36 Cal. App.

2nd 542, 98 Pac. 2nd 253; *Modern Woodmen of America vs. Gray*, 113 Cal. App. 729, 299 Pac. 754; *New York Life Insurance Co. vs. Bank of Italy*, 60 Cal. App. 602, 214 Pac. 61; *Ballinger vs. Ballinger*, 9 Cal. 2nd 330; 70 Pac. 2nd 629; *Fields vs. Michael*, 91 Cal. App. 2nd 443, 205 Pac. 2nd 402. From the foregoing it follows that the trial court was in error in determining that these policies which constituted undisputed community assets were transferred in their entirety to Jessie Mildren by virtue of the purported change of beneficiary.

III.

The trial Court erred in determining the agreement dated January 28, 1948, did not transfer title of the insurance policies from Paul Mildren, deceased, to Appellant, Alleen S. Mildren.

Under California Law a husband and wife even without a separation may contract each other concerning their respective property rights (Civil Code of California, Section 158) *Perkins vs. Sunset Telephone & Telegraph Co.*, 155 Cal. 712, 103 Pac. 190; in the absence of a violation of the general rules on confidential transactions, the Court has no power to disapprove an agreement which divides community property or which transmutes such property into separate property or separate property into community property. *Adams vs. Adams*, 29 Cal. 2nd 621, 177 Pac. 2nd 265; *Majors vs. Majors*, 70 Cal. App. 2nd 619, 161 Pac. 2nd 494.

And where the parties have acquiesced in such a division; have delivered the property to each other,

and no action is taken to set it aside for a considerable period of time the agreement is fully and finally binding. So far as this proceeding is concerned it clearly appears that the agreement of January 28, 1948, was before the trial court in the divorce action and was not disapproved. The uncontradicted evidence described above to the effect that the time of signing the agreement the deceased Paul Mildren, told his wife he would bring out the insurance policies the next time he came out; that he fulfilled his promise and delivered the policies to her is strongly persuasive evidence that the intention of the parties was to make a present transfer of the policies from deceased to Alleen S. Mildren on January 28, 1948; that this was a fully executed transaction. There is no evidence to the contrary, and no reasonable inference may be drawn from any of the testimony in the case that a gift was not intended at that time. The mere fact that at the time of the divorce proceeding the husband changed his mind and attempted to regain possession of the policies cannot alter the effect that what he did at the time of the execution of the agreement and immediately thereafter. Where a donor uses clear and unambiguous language showing a clear intent to make a gift and a belief on his part that he has done all that is necessary to complete it, the act of delivery if slight and ambiguous will be aided thereby. *Leitch vs. Diamond National Bank*, 83 Atl. 416, 234 Pa. 557. We have here exactly the opposite situation from that which existed in the case of *Union Mutual Life Insurance Co. vs. Broderick*, 196 Cal. 497, 238 Pac. 1034, as in that case although the wife claimed a gift was

made to her, the policy was in fact delivered to decedent's sister, and he actually executed a change of beneficiary as to the policy during the time the same was in his possession, and at a time when he was able to do so. In this case, no delivery of the policies was made to anyone but the appellant, Alleen S. Mildren, herein. In the cited case, the delivery of the policy to the sister was held to constitute an effectual transfer of the proceeds of the policy. Here we have a transfer of possession made directly from the husband to the wife, and the policies were thereafter held by her. Accordingly it is respectfully submitted upon this point alone that appellant, Alleen S. Mildren is entitled to the entire proceeds of the insurance policies here involved.

IV.

The Court erred in determining that notwithstanding the community character of the life insurance policies herein above mentioned that the deceased Paul Mildren, did lawfully transfer more than one-half of the proceeds of said policies. As we have seen above, if, as contended by appellant and under the authorities cited, the insurance policies represented undistributed community property, the trial court was without authority to determine that the deceased, Paul Mildren, could make a gift of more than one-half of the proceeds of said policies. Section 164 of the Civil Code of California which was in force at the time of the death of deceased and which had been in force for many years in its then form during the married life of the parties

hereto, provides in part as follows:—“All other property acquired after marriage by either husband or wife or both including real property situated in this state and the personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domicile in this state, is community property. Section 161A of the same code provides as follows: “The respective interests of the husband and wife in community property during continuance of the marriage relation are present existing and equal interests under the management and control of the husband as is provided in Sections 172 and 172A of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property.” Section 172 of the same code provides: “the husband has the management and control of the community personal property with like absolute power of disposition other than testamentary as he has of his separate estate; *provided however that he cannot make a gift of such community personal property or dispose of the same without a valuable consideration*, or sell, convey or encumber the furniture, furnishings or fittings of the home, or the clothing or wearing apparel of the wife or the minor children that is community without the written consent of the wife.” Section 172A, referred to above in Section 161A of the Code relates only to real property and the same will not be repeated here.

As pointed out above, a life insurance policy purchased with community funds is community property,

and the husband is without authority in any manner to transfer more than one-half of the proceeds of any such policies.

This question was squarely before the court in accordance with the terms of the pre-trial order (Transcript of Record, page 82(3)). Findings Nos. 18 and 19 (Transcript of Record, pages 102 to 104 inclusive) are the findings upon which the judgment was based, and are, of course, squarely opposed to the statutory provisions referred to in this assignment of error.

It is submitted that under the authorities hereinabove set forth in regard to this matter, the action of the Court in determining that there was a complete transfer of the right to the proceeds of the policies, is contrary to both the evidence and the law.

V.

The trial court erred in failing to find specifically upon the issue as to whether or not the deceased, Paul Mildren, had lawful authority to transfer more than one-half of the proceeds of such policies. This issue was tendered under issues of law ((3) pages 82 and 83 Transcript of Record). It may, of course, be said that where other findings made necessarily negative the right of the objecting party to a judgment in his favor, it is not necessary to make findings upon such issue. The answer to this is that this was a material issue squarely before the court under the pre-trial order as has been shown hereinabove, and that an omnibus finding that material allegations in named para-

graphs of defendant's affirmative defense were not proved, was insufficient to support the judgment. *Gordon vs. Beck*, 196 Cal. 768, 239 Pac. 309. The omnibus finding to which appellants object is contained in paragraph 22 of the findings. (Transcript of Record, pages 104 and 105) as follows: "Except as otherwise expressly found all the allegations contained in the plaintiff's complaint and in the cross-complaint of Jessie Mildren are true; except as otherwise expressly found all the allegations contained in the cross-complaint of Alleen S. Mildren and Donald L. Mildren and in the answers of Alleen S. Mildren and Donald L. Mildren to the plaintiff's complaint and to Jessie Mildren's cross-complaint are false." It is submitted that under these authorities cited this is an insufficient finding upon which the judgment can be based, and particularly that it is insufficient as a finding upon the issues raised as to the community character of the policies; the issue as to whether they were undistributed community property; and the issue as to whether or not the deceased had the right to make a valid gift of more than one-half of the community interest in the policies of insurance. It is submitted that upon this ground alone a reversal should follow.

CONCLUSION

It is accordingly submitted that inasmuch as the Court erred in determining:—

I.

That the provisions of the interlocutory and final decrees of divorce in the action of *Mildren vs. Mildren* in the Superior Court of San Bernardino County were valid and effective to constitute the insured the sole owner of the policies of insurance;

II.

In paragraph 19 of the findings of fact and conclusions of law, that the purported change of beneficiary upon said policies by the insured was valid and effective to change the beneficiary to the defendant, Jessie Mildren, appellee herein, and that she was entitled to receive payment of the entire proceeds of the policies;

III.

That a purported change of beneficiary as to said policies by the insured, Paul Mildren, was valid and effective to change the beneficiary under each of said policies of insurance, and that the defendant, Jessie Mildren, is the sole beneficiary under said policies and is entitled to receive payment of the entire proceeds thereof;

IV.

That the interlocutory and final decrees of divorce were sufficient in law to transfer any title to the insur-

ance policies hereinabove designated when the only designation as to said policies in said decrees was "Life Insurance Policies";

V.

That the agreement of the parties dated January 28, 1948, coupled with their subsequent conduct did not transfer title to the insurance policies from Paul Mildren, deceased, to the appellant, Alleen S. Mildren;

VI.

That notwithstanding the community character of the life insurance policies hereinabove mentioned, the deceased, Paul Mildren, could lawfully transfer more than one-half of the proceeds of said policies;

VII.

And in failing to find specifically upon the issue as to whether or not the deceased, Paul Mildren, had lawful authority to transfer more than one-half of the proceeds of such policies;

That the findings of fact and conclusions of law and judgment are and each of them is clearly erroneous, to the prejudice of the rights of the appellants, and that the judgment should be reversed and remanded.

All of which is,

Respectfully submitted,

TAYLOR F. PETERSON

Attorney for Appellants.